Before the
Federal Communications Commission
Washington, D.C.

In the matter of	)	
	)	
Usage of the Public Switched	)	
Network by Information Service	)	CC Docket No. 96-263
and Internet Access Providers	)	

Reply Comments of the Alliance for Public Technology

The Alliance for Public Technology (APT),[1] a consumer coalition of 107 public interest organizations and more than 190 individuals, submits these reply comments in response to the Notice of Inquiry (NOI) in the matter of usage of the public switched network by information service and Internet access providers.

Summary

- Access rules must be designed for, and accelerate the deployment of advanced facilities to the home that are capable of the high bandwidth, reliable transmission that is essential for the delivery of advanced services at affordable rates.
- APT believes that wholesale customers should bear a significant share of the cost of a high bandwidth local infrastructure that will be necessary for the delivery of their products and services.
- APT does not favor application of IXC access charges to Internet service providers (ISPs).

[1] The Alliance was founded in 1986 and is a non-profit, tax-exempt membership organization with the charter to foster affordable access by all consumers to advanced telecommunications services. APT is governed by a Board of Directors.

- APT believes that the Commission should establish interim access charges based on the lowest estimate of forward looking economic cost[2] or, alternatively, fees based on the number of subscribers or other surrogate measures of demand for ISPs.

- Data networks that would route data traffic off the voice network and provide for faster and higher bandwidth transmissions are not being used by ISPs to deliver Internet services to our homes.

- The argument that the imposition of interim access charges or fees for use of the local network on ISPs would constitute government regulation of the Internet is without merit.

- Modifying the ISP exemption need not increase costs to consumers.

- The ISP exemption is a roadblock to competition for data services.

Introduction

APT notes that most parties share the same goal: moving data traffic off the voice network. In our comments, we identified new technologies that are being deployed to do just that. A number of local telephone companies and telecommunications equipment manufacturers have developed network solutions that would route data traffic off the voice network and provide for faster and higher bandwidth transmissions. These network solutions are available today from companies such as Bell Atlantic, Nortel, Lucent, US West, and GTE under such names as Internet Protocol Routing Service (IPRS), digital

[2] APT recommends that the Commission consider adopting interim access charges for ISPs based on the lowest estimate of forward looking economic costs or, alternatively, fees based on the number of subscribers or other surrogate measures of demand. Notwithstanding this recommendation, APT opposes the use of forward looking cost models such as Total Element Long Run Incremental Costs (TELRIC) as proposed by the Commission in its interconnection order. APT and other public interest organizations prepared an amicus brief to the United States Court of Appeals for the Eighth Circuit in IOWA UTILITIES BOARD, et. al., v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA which details our objections to the Commission's adoption of TELRIC for interconnection. A copy of the amicus brief is attached hereto as Attachment A. A motion to file the brief was not granted by the Court.

subscriber line (xDSL), Internet/Intranet Transport Service (IITS), and CyberPop. What they have in common is the routing of data traffic off the voice network, use of data packets, higher speeds and, in some cases, higher bandwidth. **But these new technologies are not being used by ISPs to deliver Internet services to our homes.**[3] Other network services are being deployed and used by ISPs for the provision of dedicated Internet access to large businesses and institutional clients.

The key issue before the Commission is how to ensure that these new technologies are deployed and used to deliver data and other services to our homes.[4] Several parties, including APT, believe that without appropriate economic signals, ISPs will continue to rely on the voice network to deliver data traffic. Others suggest that if local exchange carriers and others build data network, ISPs will migrate their services to them. In the movie "Field of Dreams" Ray Kinsella listened to the voice and built a baseball field. Shoeless Joe Jackson and other baseball immortals returned to play the game once again. In Hollywood, "if you build it, [they] will come" may be a rational economic model and an efficient way to allocate resources. We are less sanguine, however, about its utility as a model of economic behavior.

[3] Free or, in this case, subsidized access enjoyed by ISPs serves as a disincentive to the deployment and use of higher quality, higher speed, and higher bandwidth networks that reach the home.

[4] As is required by Section 706 of the Telecommunications Act of 1996.

I. MODIFYING THE ISP EXEMPTION WOULD NOT CONSTITUTE NEW GOVERNMENT REGULATION ON THE INTERNET

Several parties oppose imposition of access charges or other fees for use of the local network on ISPs alleging that such fees are a form of government regulation of the Internet.[5] APT believes that this argument is without merit.

The ISP exemption is, in fact, a form of government regulation. It exempts ISPs from the payment of access charges or fees for use of the local network. It treats ISPs differently than other users of the local network. It reallocates costs imposed by ISPs to other uses of the local network, including residential ratepayers.[6]

Rather than treat ISPs like other users of the local network, the Commission, 14-years ago, afforded the nascent ISP industry a unique regulatory status. The issue before the Commission is whether or not that unique status should be continued, discontinued or modified. Whatever one's view of government regulation of the Internet may be, it is simply inappropriate to suggest that reforming the ISP exemption would constitute new government regulation of the Internet.

II. MODIFYING THE ISP EXEMPTION NEED NOT INCREASE COSTS TO CONSUMERS

Several Parties[7] argue that removing or modifying the ISP exemption will result

[5] See, for example, comments of the United States Internet Providers Association.

[6] The Commission may wish to consider how this implicit subsidy of the ISP industry can be retained in light of the clear direction of Congress in the Telecommunications Act of 1996 to make all subsidies explicit.

[7] See, for example, comments of NetAction et. al., (the Internet Consumer Parties).

in higher costs to consumers who use on-line services. APT disagrees. As noted in our comments, there are many reasons to believe that this need not be the case.

First, there currently exists a wide variation in the prices charged by ISPs for service to individual consumers,[8] and new economic models are emerging that can drastically reduce, if not eliminate, consumer charges.[9] Second, APT notes that the largest ISP in the nation -- AOL -- only recently went to flat rate pricing and still has metered plans.[10] **Third, and most importantly, APT believes that the imposition of interim ISP access charges or fees will provide incentives to move ISP traffic off of the voice network and on to data networks where new pricing models based on bandwidth and other measures of demand will replace per minute or other charges.**

III. MODIFYING THE ISP EXEMPTION WILL ENHANCE COMPETITION

Some parties[11] argue that if the ISP exemption is repealed or modified, local exchange carriers will have little, if any, incentive to deploy data networks like those noted above. They argue that the additional revenues that local exchange carriers would derive from ISP access payments would create a disincentive. However, these parties overlook several key points.

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[8] For example, America On-line offers a flat rate of $19.95 per month. The rate drops to $14.95 per month for customers who are willing to pay for two years in advance. Erol's and Tidal Wave Communications Inc., offer Internet service for $9.50 per month for those willing to pay in advance. And, GTE offers a $2 per month discount -- from $19.95 to $17.95 -- on Internet service to its long distance customers.

[9] The advent of free, advertiser-supported e-mail and Internet service is discussed in Connie Guglielmo's *Services Offer Free Ticket to Ride*, Inter@ctive Week, January 13, 1997.

[10] For example, AOL customers may choose a basic plan, which includes 3 hours of service per month for $4.95 and $2.50 for each additional hour, a $19.95 per month flat rate plan, or a two-year subscription for $358.80.

[11] See, for example, comments of the Internet Users Coalition.

First, the ISP exemption creates a strong disincentive for ISPs to use the new data networks already being deployed by local exchange carriers. The ISPs are, in effect, encouraging local exchange carriers to do what they claim they do not want them to do -- continue to invest in the voice network to accommodate growing data traffic. APT believes that this is particularly true as regards service to consumers in their homes.

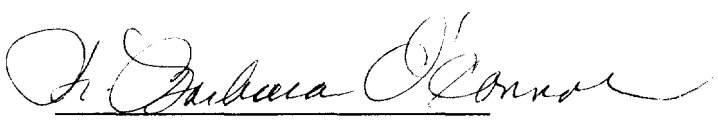
Second, data networks already being deployed, particularly packet networks, have tremendous capacity and are not subject to the same constraints as the voice network. When users connect via a packet network they do not occupy a line or a channel for the duration of their time on-line. They only use network capacity when they are transmitting or receiving information. These and other technical characteristics would create a strong incentive for local exchange carriers to deploy networks that allow ISPs to serve residential as well as business customers.

Finally, the ISP exemption not only creates a disincentive for ISPs to use data networks, it also creates a disincentive for competitive local exchange carriers, competitive access providers, cable, fixed wireless operators and others to compete for ISPs' residential customers. Until such time as access prices are economically efficient, taking into account cost, profit and capital needs for investment and innovation in the local network, ISPs have little, if any, incentive to move to data networks that are available from the local exchange carriers **or new competitors. Contrary to what some parties have suggested, the ISP exemption is a roadblock to competition for data services.**

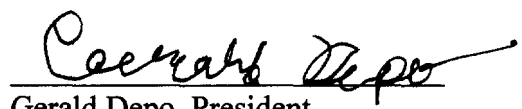
Conclusion

Nothing in the comments in this proceeding shakes APT from its view that the current ISP exemption discourages investment and innovation in the local telephone network. The ISP exemption is also inconsistent with APT's fundamental position that all users should contribute to the maintenance and upgrade of the network based upon the demands that they place on the network. The ISP exemption may have served its purpose when it was first adopted. But it can no longer be supported as the Commission moves to reform access charges and as the access market becomes increasingly competitive.

Respectfully submitted,



Dr. Barbara O'Connor, Chair



Gerald Depo, President

Henry Geller, Member
Board of Directors

April 23, 1997

ATTACHMENT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3321 (and consolidated cases)

IOWA UTILITIES BOARD, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition to Review an Order of the
Federal Communications Commission

BRIEF AMICUS CURIAE OF ALLIANCE FOR PUBLIC TECHNOLOGY, UNITED HOMEOWNERS ASSOCIATION, NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN, NATIONAL HISPANIC COUNCIL ON AGING NATIONAL ASSOCIATION OF DEVELOPMENT ORGANIZATIONS WORLD INSTITUTE ON DISABILITY

November 15, 1996

PRELIMINARY STATEMENT

The Alliance for Public Technology (APT), joined by other groups,[1] is a coalition of individuals and more than ninety nonprofit groups. The Alliance believes that the nation cannot reap the full benefits from advances in telecommunications technology unless everyone has full access to switched networks that are capable of providing, on a two-way basis, informational and transactional services using voice, high-speed data, graphics and video (herein termed "advanced telecom capabilities").[2] It has accordingly pressed this view upon Congress, the Federal Communications Commission (FCC) and the courts in appropriate proceedings.

APT and other amici submit this brief in support of the petitions seeking reversal and remand of the Commission's First Report and Order.[3] The brief is directed to only one issue -- namely, that the FCC's action constituted legal error because instead of following the clear prescription of the 1996 Telecommunications Act to afford incentives for the local exchange carriers (LECs) to make the investment needed to provide advanced communications capabilities to all Americans,[4] the Commission patently discouraged such investment. The grounds for our position follow.[5]

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[1] In the Appendix to this brief there is a short description of the other organizations joining in the brief.

[2] The APT position is set forth in two documents, "Connecting Each to All" (1993) and "Principles to Implement the Goal of Advanced Universal Service" (1995).

[3] First Report and Order, Implementation of Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (Aug. 8, 1996) (First Report and Order).

[4] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Section 706.

[5] We rely upon the briefs of petitioners for the Statement of the Case. It would serve no useful purpose for this amicus brief to go over the facts covered at length in those briefs. In particular, we will not set out the pertinent factual background as to the FCC's adoption of the TELRIC (Total Element Long Run Incremental Pricing) for the unbundled elements of the incumbent LECs (ILECs).

SUMMARY OF ARGUMENT

Section 706 requires the FCC to act in every proceeding to encourage the timely deployment of advanced telecommunications. That directive is especially applicable to this critically important proceeding. By not exempting from the unbundling/TELRIC scheme the future deployment by incumbent LECs of advanced communications capabilities, the agency has placed a strong disincentive in the way of such deployment.

I. The 1996 Act calls for the FCC to encourage the deployment of advanced communications capabilities to all regions of the country.

The existing local telephone system is ubiquitous but narrowband as to residential subscribers, because its last distributional segment to the home (the local loop from the central office switch to the home) is based on a copper wire called a twisted pair. The computer and related information industries are growing at an extraordinary speed, with, for example, the number of transistors on a chip doubling every eighteen months.[6] The information industries thus generate enormous and growing quantities of high speed data. The long distance networks, based on fiber optic cable or very large capacity satellites, can handle these high volumes.[7] But when these transmissions come to the localities and involve residences or small businesses, the information superhighway becomes a "dirt road."[8]

There is thus a clear need for advanced telecom capabilities if the United States is to forge ahead in the information society that has emerged. Telecommunications -- a tremendous enabling technology -- must make a maximum contribution to efficiencies, so needed in this era of global

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[6] See Bill Gates, "The Road Ahead," Viking, 1995, at 31-33.

[7] Id. at 30-31,

[8] Id.; see also Michael Dertouzos, Technology Review, Oct. 1991, reprinted in App. D, Fiber Optics: An Opportunity for a New Policy?", The Annenberg Washington Program, 1993.

competition, and to the quality of life in sectors like education, health care, telecommuting, energy conservation, the environment and the democratic process. It cannot do so without moving in a timely fashion into the advanced broadband capabilities at the local level.

The validity of the foregoing is affirmed by the express provisions of the 1996 Act. Thus, in Section 254(b)(2), the Act sets out as a guiding principle of universal service that "access to advanced telecommunications and informational services should be provided in all regions of the Nation." Even more important are the provisions of Section 706 ("Advanced Telecommunications Incentives"). Section 706(a) requires the Commission and state commissions to encourage the timely deployment of advanced telecom capability to all Americans by using "methods that remove barriers to infrastructure development," including "regulatory forbearance." If the FCC finds in a prescribed future proceeding that such deployment is lagging, it is to "...take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[9]

II. The Commission erred in acting contrary to Section 706 in the First Report and Order.

The Interconnection proceeding was probably the most important Commission undertaking in implementing the 1996 Act. The Commission took far reaching steps to promote quick entry by new competitors in local telecommunications.[10] But the Commission had an equally important

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[9] Section 706(c) defines the term, "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications technology that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology..."

[10] We do not address the issues, substantive or jurisdictional, raised by the First Report, and argued in petitioners' briefs. Thus, it is vigorously argued that the Commission lacked authority to adopt rules in the area of intrastate rates. This is clearly a substantial issue. See Order Granting Stay Pending Judicial Review, at 11-13. If that issue is resolved against the Commission, it would also, of necessity, end the

responsibility under Section 706 to promote investment by the incumbent LECs (ILECs) in advanced communications capabilities. Instead, it acted in a way that patently discourages such investment. It did this by making the unbundling/TELRIC regulatory regime fully applicable to any advanced telecom facilities of the ILEC.

As stated, there is now no advanced telecommunications service (i.e, switched, broadband) available to residences. Consider the following two likely scenarios to meet this need. The cable television industry does have one-way broadband capacity, employing a coaxial cable drop to the home to deliver cable (video) services. Several large cable entities commendably have decided to use this base, to modernize their system (usually employing a technical approach called HFC, for hybrid-fiber-coaxial, with the latter being the coaxial drop into the home), to add the necessary switches and electronic equipment, and thus to provide switched broadband telecom services. For example, Continental Cablevision plans to enter the local telephone area, and indeed may be uniquely positioned to do so when its operations and facilities are taken over by US West, a Regional Bell Operating Company. Significantly, if the cable company proceeds in this fashion, its telecom operations would not come under any economic regulation, and specifically would not be subject to the unbundling/TELRIC regime.[11]

Now consider if the ILECs embark on the same course. They also have zero capability to deliver switched broadband to homes and indeed do not have the advantage of the coaxial drop. Most have decided upon the same HFC approach as cable.[12] But if the ILEC goes forward with

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matter raised in this brief -- the application of unbundling/TELRIC to intrastate advanced communications elements of ILECs.

[11] There would only be general interconnection and resale duties under Section 251(a),(b).

[12] The technology is so dynamic that it is not possible to forecast possible future changes such as a "wireless radio" drop into the home. Several ILECs propose to employ an integrated approach -- that is,

these plans for an advanced communications (switched broadband) network, it would come under the unbundling/TELRIC regulatory regime. This means that the advanced network, either in part (e.g., the broadband line into the home) or in whole (as a so-called "shadow network"), would be made available to all competitors on a TELRIC (forward-looking) basis. Further, the ILEC could not charge an interconnection price that would repay it for considerable R&D costs involved in the broadband undertaking.

We submit that the above analysis shows the obvious error of the Commission in treating future investment for advanced communications by the ILECs under the unbundling/TELRIC regime. The ILECs are rational economic entities. Why should they make the large, risky investment in switched broadband facilities if they must make the facilities available to competitors on the unbundled/ TELRIC basis? Why invest in HFC or wireless drops or whatever, if the investment, should it turn out to be inefficient or a failure, will be eliminated from prices charged to competitors for the advanced network? There would be little reason to make such investments, and every reason to invest in areas like cellular or personal communications services, long distance, cable, wireless cable, value added content, etc., services where the unbundling regime is inapplicable.

Even though the ILECs urged that the Commission would be discouraging future investment in light of the unbundling/TELRIC regime, the Commission never explains why it is

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part of the network would be used for cable television operations and another part is employed for telecom operations, including high-speed data for, say, telecommuters. Linda Moss, *Tele-TV lines up two for ad test, in* Multichannel News, July 17, 1995, at 89. The latter is obviously desirable in light of the 1996 Act's goal of making advanced communications available to all Americans.

proceeding in this fashion as to advanced communications. There is no explanation why US West, when it operates as Continental Cable in Atlanta or New England, can engage in advanced telecom activities without any requirement of unbundling/TELRIC, but when it acts, also from a zero starting base as to residences, as an in-region ILEC delivering the same advanced telecom service, it does come under that regimen. It is arbitrary for the Act to be implemented in this fashion.[13]

The Commission raised the issue of the applicability of Section 706. See Part XIII, First Report. The Alliance urged that "Section 706 should under underlie all of the FCC's proceedings," including of this first and most important one. See par. 1267, First Report. The Commission, however, sloughed aside all consideration of Section 706 in this action, saying that it intends to address issues related to Section 706 in a separate proceeding. Par. 1268. But as we have shown, the application of unbundling/TELRIC may well have an adverse effect on future investment directed to advanced communications capabilities. The FCC under Section 706 was, therefore, bound to consider the matter in this proceeding and not put it off to some future time, as it did in the case of dealing with possible inhibiting effects on ILEC incentive to innovate as to AIN (advanced intelligent network databases -- see par. 489, First Report) or proprietary elements (par. 282). Whatever the merits in those instances, here the Commission was dealing with an express Congressional mandate -- accelerate the deployment of advanced communications by removing barriers to investment. Instead, it placed a substantial barrier to that very investment.

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[13] Video distribution is today by far the largest use of broadband facilities to the home. Significantly, when the ILEC as a cable or Open Video Service (OVS) operator and the cable television system both operate in an area, both are deregulated as to government regulation of the prices charged customers. See Sec. 301(b)(3)(D). Similarly, when both operate as advanced telecom providers, both should be treated equally, with no economic (price) regulation and no unbundling/TELRIC.

We urge, therefore, that the Commission was required to adopt a course in this proceeding that would encourage the deployment of advanced communications capabilities. It could, for example, have simply excluded such advanced elements, when built and implemented, from the unbundling/TELRIC regime, just as those of cable are excluded when it enters telecom activities.[14] It could follow the course advocated by Professor Alfred E. Kahn calling for the advanced communications networks, whether telecom or cable, to go forward on an unregulated basis, with the shareholder taking all the risks and getting all the benefits (and with ratepayers protected as to basic service in view of price caps).[15] There are other courses. The choice is one for the agency. What is not permissible under the Act is its present inaction.

The Commission may argue that it has no choice under the Act but that it must apply unbundling/TELRIC to all network elements -- existing or future, basic or advanced. But the Commission has already indicated that it has discretion to alter its regime in order to spur innovation. See supra, at 7. Surely it should do so here where it is under an express Congressional mandate. Stated differently, the requirements of Section 251 must be read in conjunction with those of Section 706.[16]

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[14] If some element of the integrated advanced communications network replaces an essential element or link of the present narrow band system, that element should intend to be made available to newcomers under the unbundled/TELRIC regime, but solely on a narrowband basis to residences. Significantly, the Commission has held that generally cable has no right to take any part of the large segment of an ILEC OVS operation that is to be available on a common carrier basis. See Second Report and Order, Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46, 11 (May 31, 1996) (Second Report and Order). Appeal pending, BellSouth Corp. v. FCC, C.A.D.C Similarly, there should no basis for cable to be able to take the elements of an ILEC advanced telecom operation (or all of them as a shadow network). All competitors, starting from the same zero base, should simply build their own networks.

[15] See Declaration of Alfred E. Kahn, dated July 19, 1996, in CC Docket No. 96-112, Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services.

[16] We believe that Section 706 is controlling. But no different result would result if the matter were considered under Section 401, allowing the Commission to forbear when the criteria set out in 401(a) are

CONCLUSION

Accordingly, we urge that the Court should direct the Commission to take Section 706 into account in this proceeding. A remand is called for to protect the strong public interest mandate of that section.

Respectfully submitted,

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met. Section 401(c) states that the Commission may not forbear from applying the requirements of 251(c) or 271 until it determines that those requirements have been fully implemented. Clearly, the Act permits future forbearance when enforcement is unnecessary to insure just rates, protection of consumers, or consistency with the public interest (i.e., when some sector is in the effective competition zone). That is the case of ILEC advanced communications capabilities as to residences. The ILEC has no present monopoly and indeed starts behind cable. As to video distribution or high speed Internet connection, it will face competition from other transmissions modes like cable and again has no monopoly. When these considerations are combined with the express public interest benefits set out in Section 706 (which calls specifically for forbearance to accelerate deployment of advanced communications -- see 706(b)), the case for forbearance now as to that future investment is overwhelming.

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